No. 93-270

In The

Supreme Court of the United States

October Term, 1993

A. JOHN GEIGER,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals, Tenth Circuit

BRIEF IN OPPOSITION

RICHARD C. FORD, OBA #3028*
MARIE WESTON EVANS, OBA #2777

- Of the Firm -

CROWE & DUNLEVY
A Professional Corporation
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700

Attorneys For Respondent
New York Life Insurance Company

*Counsel of Record

September, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RULE 29.1 STATEMENT

Respondent, New York Life Insurance Company, has no parent company but has the following corporate subsidiaries which are not wholly owned:

Avanti Health Systems, Inc. (TX)
Express Scripts, Inc. (DE)
Highouse Associates, Inc. (TX)
Japan Gamma Asset Management Limited (Japan) (2)
KOHAP New York Life Insurance, Ltd. (South Korea)
Laidlaw Holdings, Inc. (DE)
Lone Star Health Plan, Inc. (TX)
Lonestar Holding Co. (TX)
Magnus Software Corporation (GA)
Monetary Research Ltd. (Bermuda)
New York Capital Resources, Inc. (DE)
NYLIFE HealthCare Management, Inc. (DE)
P.T. Asuransi Jiwa Sewu – New York Life (Indonesia)
Personal Financial Assistant, Inc. (DE)
Windsor Group Limited (England) (1)
Windsor Group Limited (England)

TABLE OF CONTENTS

Page

RULE 29.1 STATEMENT .....

TABLE OF CONTENTS .....

TABLE OF AUTHORITIES .....

STATEMENT OF THE CASE 1

ARGUMENT & AUTHORITIES 2

PROPOSITION I
THE TRIAL COURT CORRECTLY RULED THAT NEW YORK LIFE WAS ENTITLED TO RESCIND THE POLICY FOR MISREPRESENTATION 3

PROPOSITION II
THE TRIAL COURT CORRECTLY INTERPRETED OKLAHOMA LAW AS MAKING THE ALLEGED KNOWLEDGE OF FRAUD BY THE NEW YORK LIFE AGENT IRRELEVANT BECAUSE OF PLAINTIFF'S UNDISPUTED AWARENESS THAT NEW YORK LIFE WAS BEING DECEIVED 5

PROPOSITION III
THE TRIAL COURT CORRECTLY RULED THAT NEW YORK LIFE COMPLIED WITH 36 Okla. Stat. § 1219 AND TIMELY RESCINDED THE POLICY 7

A. *New York Life Complied with 36 Okla. Stat. § 1219* 7

B. *New York Life Timely Rescinded the Policy*.... 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

I. CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) 3

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986) 3

Christian v. American Home Assur. Co., 577 P.2d 899 (Okla. 1977) 8

Dennis v. William Penn Life Assur. Co., 714 F.Supp. 1580 (W.D. Okla. 1989) 8

First National Bank v. Oklahoma Sav. and Loan Board, 569 P.2d 993 (Okla. 1977) 8

Great American Reserve Ins. Co. v. Strain, 377 P.2d 583 (Okla. 1962) 9

Howell v. Blue Cross & Blue Shield, 609 P.2d 1283 (Okla. 1980) 8

Indian Territory Operating Co. v. Bridger Petroleum Corp., 500 F.Supp. 449 (W.D. Okla. 1980) 10

Manis v. Hartford Fire Ins. Co., 681 P.2d 760 (Okla. 1984) 8, 9

Minear v. Benefit Association of Ry. Employees, 169 Kan. 199, 218 P.2d 244 (1950) 6

Motors Ins. Corp. v. Freeman, 304 P.2d 328 (Okla. 1956) 6

Mutual Life Ins. Co. v. Bohlman, 328 F.2d 289 (10th Cir.1964) 5

United States Casualty Co. v. Jackson, 173 Okla. 69, 46 P.2d 939 (1935) 9

TABLE OF AUTHORITIES – Continued

Page

II. Statutes & Rules

Sup. Ct. R. 10.1 2

36 Okla. Stat. § 3609(A) 4

36 Okla. Stat. § 1219..... 7

36 Okla. Stat. § 3629..... 9

36 Okla. Stat. § 4405(A)(8)..... 8

III. Other Authorities

3 Couch on Insurance 2d, §§ 26:132, 26:151, pp. 655-663, 701-703 6

STATEMENT OF THE CASE

Petitioner's invocation of the jurisdiction of this Court is based on nothing more than the argument that the courts below erred in applying Oklahoma law to the undisputed facts. Petitioner raises no issue of interpretation of any statute or rule, no constitutional issue, no claim of conflict among the circuits, and no issue of significance beyond the facts of this case.

Petitioner is an osteopathic physician who formerly operated a clinic in Wynnewood, Oklahoma. In the fall of 1990, he applied for, and was issued, a New York Life disability policy that provided for income replacement payments of $36,000 per year in the event of total disability. The policy was issued based on his representation that his income, as shown by his tax returns, exceeded $50,000 for each of the preceding two calendar years. (Petitioner's Appendix at A-4). In fact, his income was less than $15,000 in each of those years. (*Id.*) Petitioner admitted below that he knew the application was false when he signed it. (Petitioner's Appendix at A-7). There was undisputed evidence that the policy would not have been written if petitioner's income history had been accurately stated. (Petitioner's Appendix at A-4). A month after the policy was issued, petitioner claimed to have a stroke, which he initially diagnosed and treated himself, and which he claimed resulted in complete and total disability. Petitioner filed his claim for disability benefits in February 1991. The apparent misrepresentations were discovered in the course of routine investigation. Petitioner filed suit in September 1991 for breach of contract

and bad faith. Respondent rescinded the policy after petitioner admitted in his deposition that he was aware of the misrepresentations in his application for insurance.

The trial court granted respondent's motion for summary judgment based on the misrepresentations and rejected petitioner's attempts to avoid the effect of those misrepresentations as insufficient under Oklahoma law. The Court of Appeals affirmed, also on the basis that his attempts to avoid rescission for fraud were insufficient under Oklahoma law.

The district court and the court of appeals applied settled principles of Oklahoma law, none of which petitioner disputes here, in rejecting his claims as a matter of law. Neither court failed to consider, as the petition alleges, pertinent facts. Rather, both courts determined as a matter of law that the facts were insufficient under Oklahoma law to entitle petitioner to relief.

ARGUMENT & AUTHORITIES

Petitioner's argument to this court is nothing more than a disagreement with the decision of the courts below on a fact specific issue under state law. Even if petitioner's arguments were arguably correct, the case presents no justification for issuance of a writ. As Rule 10.1 provides, review by certiorari is a matter of discretion, not right, and will not be granted in the absence of "special and important" reasons therefor. Application of settled principles of state law to undisputed facts is the province of the lower courts, and claims that they have erred in doing so do not constitute special and important

reasons for the exercise of this Court's certiorari jurisdiction. Moreover, it is apparent that the decisions of the courts below were not erroneous.

PROPOSITION I

THE TRIAL COURT CORRECTLY RULED THAT NEW YORK LIFE WAS ENTITLED TO RESCIND THE POLICY FOR MISREPRESENTATION.

The trial court has a duty in an appropriate case to enter, and reviewing courts have a duty to uphold, a summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Since, here, plaintiff does not challenge the undisputed facts, his only proper challenge can be to the application of Oklahoma law. Plaintiff did not challenge below, and does not challenge here, the undisputed facts on which the decision below was based. Indeed, he affirmed them in such admissions as:

> In the case at bar, there is no factual issue of the falsity of the relevant statements made in the application.
>
> Appellant furnished appellee his income tax returns which revealed his misrepresentations.

(Appellant's Brief, Tenth Circuit Court of Appeals, at pp. 20, 22). His Petition to this Court acknowledges that the

fact that he knowingly misrepresented his income in the application is undisputed. (Petitioner's Brief at p. 4).

The trial court and the Court of Appeals correctly applied Oklahoma law to the undisputed facts. By statute, 36 Okla. Stat. § 3609(A), Oklahoma allows an insurer to rescind a policy of insurance on the basis of misrepresentations, omissions, concealment of facts, and incorrect statements in the application if these were:

1. Fraudulent; or
2. Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
3. The insurer in good faith would either not have issued the policy, or would not have issued a policy in as large an amount, or would not have provided coverage with respect of the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or otherwise.

The undisputed facts demonstrated the existence of all these factors. Plaintiff did not challenge the facts on which the trial court based its ruling that New York Life was entitled to rescind the insurance policy under 36 Okla. Stat. § 3609(A).

PROPOSITION II

THE TRIAL COURT CORRECTLY INTERPRETED OKLAHOMA LAW AS MAKING THE ALLEGED KNOWLEDGE OF FRAUD BY THE NEW YORK LIFE AGENT IRRELEVANT BECAUSE OF PLAINTIFF'S UNDISPUTED AWARENESS THAT NEW YORK LIFE WAS BEING DECEIVED.

The courts below correctly interpreted Oklahoma law in holding that the alleged knowledge of the misrepresentations by the selling agent did not deprive New York Life of its right to rescind. The rulings were based on clear prior decisions of both the Court of Appeals and the Supreme Court of Oklahoma. If an applicant for insurance knows or should know that the insurer is being deceived by false information on the application for insurance, the insurer is not bound by the agent's knowledge of the truth.

See, e.g., Mutual Life Ins. Co. v. Bohlman, 328 F.2d 289, 294 (10th Cir. 1964) which unambiguously supports the decision below. In that case, the Court rejected an insured's similar attempt to avoid the impact of his misrepresentations. The insured misrepresented his physical condition by failing to disclose preexisting medical problems which, if known, disqualified him from eligibility for coverage. The insured claimed that the company's examining physician knew the true facts and that his knowledge was imputed to the company. The Court relied on evidence that the insured knew that the physician, who was his partner and treating physician, would also deceive the company. The Court stated:

> It is true that as a general rule knowledge obtained by an agent of an insurer while acting

> within the scope of his authority is imputed to the insurer and this rule applies to a medical examiner such as Dr. Cox. 3 Couch on Insurance 2d, §§ 26:132, 26:151, pp. 655-663, 701-703. The underlying reason for the rule is that "* * * an innocent third party may properly presume the agent will perform his duty and report all facts which affect the principal's interest. * * * " *Colonial Sugar Co. v. Waldrep*, 121 Okl. 31, 246 P. 623, 625. But, the rule does not apply when the third party knows there is no foundation for the ordinary presumption – when he is acquainted with circumstances plainly indicating that the agent will not advise his principal – as it is intended to protect those who exercise good faith, and not as a shield for unfair dealing. *Mutual Life Insurance Co. of New York v. Hilton-Green*, 241 U.S. 613, 36 S.Ct. 676, 60 L.Ed. 1202; *Colonial Sugar Co. v. Waldrep, supra. See also Allen & Scott v. Stahl*, 181 Okl. 527, 75 P.2d 204; *Nichols v. Stahl*, 182 Okl. 191, 76 P.2d 1043.

Id. at 294.

The parallel to this case is obvious. The agent who took Geiger's application was his wife, and his allegations at best allege a joint effort between the two to defraud New York Life. Thus, the Court's decision in *Mutual* is squarely on point. *See also Motors Ins. Corp. v. Freeman*, 304 P.2d 328, 330-331 (Okla. 1956); *Minear v. Benefit Association of Ry. Employees*, 169 Kan. 199, 218 P.2d 244, 247-48 (1950).

Plaintiff's claim that the district court and the Court of Appeals did not address this issue is incorrect. Geiger's arguments were specifically considered, and rejected by both the trial court (Petitioner's Appendix at

B-11 - B-12) and the Court of Appeals. (Petitioner's Appendix at A-5 - A-6).

Plaintiff admitted below that the facts as to his income and medical history in his application were false, that he knew of the falsity when he signed it, and that he knew those false statements would be submitted to New York Life. He knew that New York Life would be deceived by the information submitted on his application. He does not challenge those undisputed facts now. His allegations against New York Life's agent, whether true or not, were immaterial and the trial court correctly granted New York Life judgment as a matter of law:

> To hold otherwise would be against not only the cases dealing with misstatements in insurance applications but public policy as well.

(Petitioner's Appendix at B-16).

PROPOSITION III

THE TRIAL COURT CORRECTLY RULED THAT NEW YORK LIFE COMPLIED WITH 36 Okla. Stat. § 1219 AND TIMELY RESCINDED THE POLICY.

A. New York Life Complied with 36 Okla. Stat. § 1219.

New York Life's notice to the plaintiff complied with 36 Okla. Stat. § 1219, which states, in relevant part:

> [i]n the . . . processing of any individual . . . accident and health insurance policy, it shall be an unfair trade practice for any insurer to fail to notify a policyholder in writing of the cause for

> delay in payment of any claim where said claim is not paid within thirty (30) days after receipt of proof of loss; the notification shall be by mail with return receipt requested.

Plaintiff admitted below he received *actual* notice, within thirty days of his proof of loss, that there would be a delay in the resolution of his claim. One having actual notice is not prejudiced by, and may not complain of, the failure to receive statutory notice. *Howell v. Blue Cross & Blue Shield*, 609 P.2d 1283, 1284 (Okla. 1980); *First National Bank v. Oklahoma Sav. and Loan Board*, 569 P.2d 993, 997 (Okla. 1977) (where one has actual notice, statutory notice is not required).

Even if plaintiff had established that New York Life did not comply with 36 Okla. Stat. § 1219, he did not establish New York Life's liability on the policy. The same is true of plaintiff's allegation that New York Life failed to comply with 36 Okla. Stat. § 4405(A)(8), which states, in relevant part:

> Accident and Health policy provisions . . . TIME OF PAYMENT OF CLAIMS: Indemnities payable under this policy for any loss other than loss for which this policy provides any periodic payment will be paid immediately upon receipt of due written proof of such loss . . .

Since plaintiff's claim was not valid, §§ 1219 and 4405(A)(8) did not apply. *Christian v. American Home Assur. Co.*, 577 P.2d 899, 903 (Okla. 1977) (an insurer is required to pay a claim promptly under § 4405(A)(8) only if the claim is valid); *Dennis v. William Penn Life Assur. Co.*, 714 F.Supp. 1580, 1584 (W.D. Okla. 1989) (duty of good faith arises only in the handling of a valid claim); *Manis v.*

Hartford Fire Ins. Co., 681 P.2d 760, 761-62 (Okla. 1984) (failure to supply forms required by 36 Okla. Stat. § 3629 cannot be a breach of the duty of good faith where there is a legitimate dispute over the validity of the claim). Because plaintiff's admitted misrepresentations made the claim invalid, the trial court correctly ruled that §§ 1219 and 4405(A)(8) did not apply.

B. New York Life Timely Rescinded the Policy.

Similarly, plaintiff's claims of waiver and estoppel were insufficient as a matter of law. The trial court properly found New York Life had sufficient justification for its continued acceptance of plaintiff's premiums because there was a legitimate dispute regarding whether he had a valid claim. (Petitioner's Appendix at B-14 - B-15).

Oklahoma law recognizes the need for an insurer to have time to investigate claims, and only requires that the policy be rescinded and premiums returned in a reasonable time after discovery of the misrepresentation, and prior to a judgment in a lawsuit. The authority cited by plaintiff supports this position. *Great American Reserve Ins. Co. v. Strain*, 377 P.2d 583 (Okla. 1962) recognized that rescission and return of premiums may be considered to have been made in a reasonable time even if made after the commencement of a lawsuit, so long as the tender is made *before judgment*. *Strain*, 377 P.2d at 588. *See also United States Casualty Co. v. Jackson*, 173 Okla. 69, 46 P.2d 939 (Okla. 1935). *Strain* and *Jackson* make clear that all New York Life was required to do was return the premiums in a reasonable time, and prior to judgment. New York Life promptly rescinded and tendered a return of

premiums once plaintiff admitted his misrepresentations. That happened in his deposition. Because New York Life met the only requirements imposed under Oklahoma law, it was not estopped from denying liability, nor did it waive its rights.

Additionally, plaintiff neither pled nor proved below the elements necessary to establish waiver and estoppel. Estoppel requires voluntary conduct on the part of New York Life, which conduct causes plaintiff to change his position to his detriment. *See Indian Territory Operating Co. v. Bridger Petroleum Corp.*, 500 F.Supp. 449, 451 (W.D. Okla. 1980). Waiver requires voluntary and intentional relinquishment of a known right. *Indian Territory Operating Co.*, 500 F. Supp. at 451.

Plaintiff did not offer below, and does not offer on appeal, any evidence to meet these requirements. Nor is there any such evidence in this case. New York Life's conduct was voluntary only in the sense that it justifiably chose to investigate a claim on a policy which was procured through intentional misrepresentation. The terms of the investigation and its timeliness were at least partially dictated by plaintiff's slow response to New York Life's requests for information and the commencement of his lawsuit before New York Life had the opportunity to complete its investigation.

Even if the timeliness of New York Life's rescission is considered voluntary, there is no evidence that plaintiff relied upon New York Life's conduct to his detriment. New York Life did not become aware of the misrepresentation until after plaintiff's alleged disability, after which plaintiff would not likely have been able to obtain other

insurance and therefore suffered no detriment in that regard. New York Life was unable to ascertain, and plaintiff did not suggest, any other acts of reliance.

New York Life did not intentionally relinquish a known right. Instead, New York Life promptly, yet thoroughly, tried to preserve its rights. Clearly, therefore, there was no evidence available to support the elements necessary to establish plaintiff's claims of waiver and estoppel.

CONCLUSION

For all of the reasons and arguments set forth above, New York Life urges the Court to deny certiorari in this case.

Respectfully submitted,

RICHARD C. FORD, OBA #3028
(Counsel of Record)
MARIE WESTON EVANS, OBA #2777

- Of the Firm -

CROWE & DUNLEVY
A Professional Corporation
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700

Attorneys For Respondent
New York Life Insurance Company